IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEYSI MAGAGNOLI, parent and natural guardian of LUCA MAGAGNOLI, a minor, and in her own right, and LORENZO MAGAGNOLI, Plaintiffs, v. WEGMANS ALLENTOWN, WEGMANS FOOD MARKETS, INC., BIRD BRAIN, INC., BIRD BRAIN AIR, LLC, and ELIZABETH MAROUCHOC, Defendants.	CIVIL ACTION NO. 15-3386

ORDER

AND NOW, this 24th day of March, 2016, upon review of Plaintiffs' Motion to Remand to State Court (Docket No. 4) and Memorandum of Law in support, Defendants' opposition thereto, and Plaintiffs' reply, and after oral argument held on this motion and after review of supplemental briefs filed by both Plaintiffs and Defendant, it is hereby **ORDERED** that Plaintiffs' Motion to Remand is **GRANTED** and this matter shall be remanded to the Court of Common Pleas for Philadelphia County[1].

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[1] The defendants have removed this action from state court, contending that federal court has subject matter jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C. §§ 1332 and 1441. An action based upon diversity, such as this one, is removable only if there is complete diversity of the parties. 28 U.S.C. § 1332(a). In this matter, Defendant Wegmans removed this case, claiming that Defendant, Elizabeth Maruchoc, a Pennsylvania citizen, was "wrongfully and fraudulently joined as a Defendant for the sole purpose of attempting to deprive Wegmans and Bird Brain, Inc. of their rights, as non-citizens of the Commonwealth of Pennsylvania, to remove this case to federal court."(See Notice of Removal, ¶ 28.)

"In a suit with named defendants who are not of diverse citizenship from the plaintiff, the diverse defendant may still remove the action if it can establish that the non-diverse defendants were 'fraudulently' named or joined solely to defeat diversity jurisdiction." In re Briscoe, 448 F.3d 201, 216 (3d Cir. 2006). However, "the removing party carries a heavy burden of persuasion" in establishing fraudulent joinder. Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir. 1992). The Third Circuit has held that joinder is fraudulent if "there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment." Briscoe, 448 F.3d at 216, citing Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir.1985). To inquire beyond the issue of whether claims are colorable "into the legal merits would be inappropriate in this preliminary jurisdictional determination." Abels, 770 F.2d at 32-33. In Gaynor v. Marriott Hotel Servs., the court summarized the status of the law as follows:

> "In evaluating the alleged fraud, the district court must focus on the plaintiff's complaint at the time the petition for removal was filed" and "must assume as true all factual allegations of the complaint." Id. at 851–52 (quotation omitted). The court must also "resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff." Id. at 852 (quotation omitted). Significantly, the court's inquiry into the validity of a complaint when faced with an assertion of fraudulent joinder is less searching than that triggered upon the filing of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Id. Thus, we will not find a defendant's joinder to be fraudulent "[s]imply because we come to believe that, at the end of the day, a state court would dismiss the allegations against a defendant for failure to state a cause of action." Lyall v. Airtran Airlines, Inc., 109 F.Supp.2d 365, 367–68 (E.D.Pa.2000) (citation omitted). Rather, we will only find fraudulent joinder where the plaintiff's claims are "'wholly insubstantial and frivolous.' " Batoff, 977 F.2d at 852 (quoting Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir.1989)). "In other words, a finding of fraudulent joinder is usually reserved for situations where recovery from the nondiverse defendant is a clear legal impossibility." West v. Marriott Hotel Servs., Inc., Civ. A. No. 10–4130, 2010 WL 4343540, *3 (E.D.Pa. Nov.2, 2010). "Fraudulent joinder should not be found simply because plaintiff has a weak case against a non-diverse defendant." Id. (citing Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir.1990)).

Gaynor v. Marriott Hotel Servs., Inc., No. 13-3607, 2013 WL 4079652 (E.D. Pa. Aug. 13, 2013) (Padova, J.).

Upon review of Plaintiffs' Complaint, and assuming all factual allegations to be true, I find that Plaintiffs have a colorable claim against Defendant Maruchoc. Plaintiffs' Complaint sets forth a negligence claim against Maruchoc, stating that she was negligent by, *inter alia*, "purchasing the firepot and firepot fuel gel without the packaging, purchasing the firepot and firepot fuel gel without ensuring that all proper warnings were included, giving the firepot and firepot fuel gel to plaintiffs without the packaging, [and] giving the firepot and firepot fuel gel without ensuring that all proper warnings were included." (Compl. ¶ 66 (a) – (d).) Stating that their theories of liability as to Ms. Maruchoc are based upon Restatement (Second) of Torts § 388, Plaintiffs claim that section 388 allows for "an individual to be found liable for giving a chattel to another when the subsequent use of said chattel causes injury," and that Maruchoc provided "Plaintiffs with a chattel without the manufacturers warnings and directions for use." (See Pl's Brief, dkt no. 4, p. 25.) At her deposition, Maruchoc testified that she "honestly" did not remember if there was something wrapped around the firepot when she purchased it, but that she did nothing to alter the firepot before she gifted it to Plaintiffs. (See dkt no. 15, Ex. A.) Michael Kier, store manager for Wegmans, testified that the firepot in question had its UPC number scanned at the register when Maruchoc purchased it, (see dkt. no. 21, Ex. A, pp. 49-50), which meant that the firepot was wrapped in packaging at the time of purchase. Mr. Kier also testified that "as a matter of process and procedure, [Wegmans] does not take the product out of the - - the package." (Id., p. 50.)

There is a clear issue of fact as to what happened to the wrappings and warnings on the firepot in question after Maruchoc purchased it and before she gave it to Plaintiffs. Plaintiffs' Complaint, which must be assumed to set forth true factual allegations at this stage of proceedings, states that they received the firepot from Maruchoc with no wrappings and no warnings. Mr. Kier testified that the product was sold in a wrapper and Ms. Maruchoc testified that she couldn't remember if there was something wrapped around the firepot when she bought it, but that she did not alter the firepot before she gave it to Plaintiffs. If Maruchoc was in fact provided with the wrapper and therefore, the warnings, when she purchased the firepot at Wegmans, it is arguable that Maruchoc meets the three elements to prove negligence under section 388: 1) she had reason to know the firepot was likely to be dangerous from reading the warnings; 2) she had no reason to believe that Plaintiffs would realize the firepot's dangerous condition, since they

BY THE COURT:

/s/ Jeffrey L. Schmehl
Jeffrey L. Schmehl, J.

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would not receive the warnings; and 3) she failed to inform Plaintiffs of the dangerous condition of the firepot, since they did not receive the warnings. Therefore, I find that there is at least "a possibility" that Maruchoc could be found negligent in this matter.

It is import to note that in making this determination, I do not find that the facts in this matter will ultimately show that Maruchoc was negligent. However, it is clear that a factual dispute exists as to what happened to the wrapper and warnings from the firepot, and at this phase of the litigation, the possibility that Maruchoc removed them cannot be ruled out. Therefore, I find that Plaintiffs' negligence claim against Maruchoc is not "wholly insubstantial and frivolous," and therefore, joinder of Maruchoc in this matter was proper. Accordingly, I will remand this matter to state court.